UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELTON VALLARE,

Defendant.

No. 5:17-CR-547(1)-OLG

ORDER

This case is before the Court on Defendant's Motion to Suppress (docket no. 64). The Court finds that the motion should be DENIED.

Background

Defendant has been charged with three counts of distribution and receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2) and two counts of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Docket no. 13.

The charges against Defendant followed the execution of a search warrant at Defendant's residence on June 14, 2017. Docket nos. 64 at 1; 71 at 1. The residence was owned by Defendant's mother and stepfather, who resided in the house with Defendant and Defendant's uncle. Docket no. 64 at 1. At approximately 6:30 on the morning of the search, Defendant's uncle left the house shortly before the search began, and after making contact with Defendant's stepfather and mother, six FBI agents entered the house with their weapons drawn, while two more officers remained outside "with their weapons drawn towards the house." Docket no. 64 at 2. The officers found Defendant in a closet in the master bedroom, where, he asserts, he was "observing the number of armed agents descend on his home in real time through a closed circuit television monitor[.]" Docket no. 64 at 2, 7.

After Defendant alerted the agents that a firearm was in the bedroom, they instructed him to remain on the floor until they secured it. Docket no. 64 at 7; 71 at 3. After the weapon had been secured, Defendant was seated on the bed, and the case agent, FBI Special Agent Rex Miller, introduced himself to Defendant. According to the Government, Defendant then "advised SA Miller to sit down, that he wanted to speak with the agents" at which point the agents brought chairs into the room for Miller and one other agent, and "[t]he defendant was informed that the agents were executing a search warrant at the home; he was not under arrest; the interview was voluntary; he was not required to make a statement or even speak with the agents; and that it was completely his decision whether to speak with the agents." Docket no. 71 at 3-4. The Government further asserts that "[t]he defendant was specifically asked if he wanted to speak with the agents, to which he clearly stated yes" and that "[t]he defendant repeatedly reiterated his desire to speak with the interviewing agents." Docket no. 71 at 4. Defendant does not appear to dispute the Government's account of the manner in which the interview commenced after the agents had secured the firearm in the bedroom. Docket no. 64 at 8 (asserting that "Mr. Vallare was initially told he was free to leave, [but that] the actions of the agents were contrary to those statements indicating that he was in fact, not free to leave.").

The agents then proceeded to question Defendant, first about with general background information regarding the residents of the home, Defendant's work history, and the presence of computers in the home, docket nos. 64 at 2-3; 71 at 4; and then proceeding to more specific questioning regarding Defendant's familiarity with peer-2-peer file sharing programs. Docket no. 71 at 4. The Government asserts that Defendant acknowledged to the agents that he was familiar with peer-2-peer file sharing programs generally, that he had used then while stationed overseas during his military service, and that he was specifically familiar with the BitComet program and understood how it operated. Docket nos. 64 at 3; 71 at 4. The Government asserts that

Defendant's demeanor changed when he was asked specifically about child pornography being distributed from the house using the internet, and when agents asked him to take a polygraph examination. Docket no. 71 at 5. According to the Government, at this point, Defendant "became agitated and belligerent, stating the interview had become too personal for him[,]" and he "terminated the interview and stated he wanted to consider consulting an attorney." Docket no. 71 at 5. The interviewing agents requested that another agent join them in the room "in the event that Mr. Vallare became combative[,]" and the agents asked that Defendant remain seated. Docket no. 64 at 3. The Government asserts that the interview had lasted "approximately 20-30 minutes[,]" docket no. 71 at 5, while Defendant asserts that "[h]e was detained for approximately an hour and questioned."[1] Docket no. 64 at 7.

Thereafter, Defendant volunteered to assist officers with moving two large dogs from the enclosed carport area of the house into two cages in the backyard, and was accompanied by agents as he walked from the bedroom to the carport. Docket nos. 64 at 3; 71 at 5. After securing the dogs, Defendant returned to the carport, still accompanied by agents, to look for his shoes, and informed the agents that another firearm was located within he carport. Docket no. 64 at 3; 71 at 5. The Government asserts that Defendant thereafter failed to comply with the officers' commands not to move towards the firearm, and was "physically removed from the room for safety purposes." Docket no. 71 at 6. In the carport area, which had previously been identified to officers by Defendant's stepfather as the area of the home where Defendant resided, docket no. 71 at 3, officers found laptop computers, which had been concealed, as well as an external hard

[1] It is not clear whether Defendant asserts that he was questioned for approximately an hour during his interview with officers in the bedroom alone, or whether his entire interaction with the officers—from their initial encounter in the master bedroom closet until his arrest—took approximately an hour. Elsewhere in Defendant's motion, he asserts that, at 6:30 a.m., officers were stationed outside the house but had not yet entered, and that "[a]ccording to agents," he was arrested at approximately 7:46 a.m. Docket no. 64 at 2-3.

drive, that contained "computer file names associated with child pornography." Docket no. 71 at 6. Officers also noted that, in addition to monitors in the master bedroom showing surveillance camera views of the outside of the residence, there were additional monitors in the carport area, showing addition views of the outside of the residence and a view of the carport area not displayed on the monitors in the master bedroom. Docket no. 71 at 6. After consulting with the United States Attorney's Office, SA Miller placed Defendant under arrest, and he was handcuffed, Mirandized, and transported to the FBI office. Docket nos. 64 at 3; 71 at 6.

Legal Standards and Analysis

Law enforcement officials must inform a suspect in custody of his right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to retained or appointed counsel, and generally, statements obtained by police during a custodial interrogation from an individual who has not been advised of these rights are inadmissible. *United States v. Courtney*, 463 F.3d 333, 336 (5th Cir. 2006) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). However, "a defendant who voluntarily gives a statement to law enforcement in a non-custodial situation need not be advised of his *Miranda* rights." *Id.* (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

"Custodial interrogation is 'questioning initiated by law enforcement officers after a person has been taken into custody'" and "[a] suspect is . . . 'in custody' for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Wright*, 777 F.3d 769, 774 (5th Cir. 2015) (quoting *United States v. Salinas*, 543 Fed. App'x 458, 462 (5th Cir. 2013) and *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988)). It is not disputed in this case that Defendant had not been placed under a formal arrest at the time he made the statements he now

seeks to have suppressed. Accordingly, the determination of custody must be made according to "the circumstances surrounding the interrogation;" and whether "given those circumstances . . . a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave." *Wright*, 777 F.3d at 774 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011)). This determination is undertaken from an objective perspective and takes into account the totality of the circumstances, "including any circumstance that would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *J.D.B.*, 564 U.S. at 271 (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994)); but "[t]he 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant." *Wright*, 777 F.3d at 775 (quoting *J.D.B.*, 564 U.S. at 271). No single circumstance surrounding the interrogation is determinative, but "[i]mportant factors include: (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory, nature of the questioning; (4) the amount of restraint on the individual's physical movement; (5) statements made by officers regarding the individual's freedom to move or leave[.]" *Wright*, 777 F.3d at 775 (internal citations omitted).

Once the Defendant has carried his initial burden of "producing some evidence on specific factual allegations [that are] sufficient to make a prima facie showing of illegality[,]" *United States v. de la Fuente*, 548 F.2d 528, 534 (5th Cir. 1977), the Government bears the burden of proving, by a preponderance of the evidence, the voluntariness of the statements. *Colorado v. Connelly*, 479 U.S. 157, 169 (1986); *see also United States v. Reynolds*, 367 F.3d 294, 297-98 (5th Cir. 2004).

In this case, it is clear that at least two of the five nondeterminative but important factors enumerated in *Wright* weigh sharply in favor of voluntariness. First, Defendant does not dispute the Government's assertions that it was he, rather than the officers, who initiated their

conversation; that "defendant advised SA Miller to sit down, that he wanted to speak with the agents." Docket no. 71 at 3. Defendant also does not dispute that Government's assertions that, before their questioning began, the officers told Defendant that, although they were present to execute a search warrant, he was not under arrest and was not required to speak with the officers. Docket no. 71 at 3-4. Second, Defendant's account of the interrogation is consistent with the Government's assertion that Defendant became agitated and nonresponsive when the agents' line of questioning transitioned from questions about the living arrangement within the house, the other residents, the number and location of computers within the house, and Defendant's familiarity with peer-2-peer file sharing programs—questions that were generally non-accusatory in nature—to accusatory questions "about child pornography being distributed from the house using the internet" and about Defendant's willingness to undergo a polygraph examination. Docket no. 64 at 8 (referring to a point after the interrogation had begun, at which "Mr. Vallare became agitated with the questioning"); 71 at 5 (when asked about child pornography specifically, and his willingness to undergo a polygraph examination, "[Defendant] became agitated and belligerent stating the interview had become too personal for him."). Once the agents transitioned to questioning that was accusatory in nature, "the defendant terminated the interview and stated that he wanted to consider consulting an attorney." Docket no. 71 at 5. In other words, the statements that Defendant now seeks to have suppressed were those made in response to the non-accusatory questions asked before he terminated the interview.

The remaining three factors also weigh in favor of a finding of voluntariness. The Government asserts that the pertinent period of questioning lasted "approximately 20-30 minutes[,]" docket no. 71 at 5, a claim that appears consistent with Defendant's timeline, in which execution of the search warrant had not yet commenced at 6:30 a.m. and Defendant, following detention of "approximately an hour"—including his initial encounter with officers

while viewing surveillance monitors in the master bedroom closet, his interrogation while seated on the bed in the bedroom, his assistance with securing the dogs in the carport, his removal from the carport, and the agents' consultation with the U.S. Attorney's Office—was placed under arrest at "approximately 7:46[.]" Docket no. 64 at 2-3. It therefore appears that Defendant was subjected to 20-30 minutes of non-accusatory questioning before the agents transitioned into accusatory questions and Defendant terminated the interview. *Compare United States v. Chavira*, 614 F.3d 127, 129 (5th Cir. 2010) ("thirty to forty minutes of increasingly accusatory questioning" of subject who was searched and handcuffed to a chair in a small, windowless room within a secured nonpublic area indicated "restrain[t] to the degree associated with formal arrest."); *United States v. Cavazos*, 668 F.3d 190, 194 n.1 (5th Cir. 2012) ("'[A] detention of approximately an hour raises considerable suspicion' that an individual has been subjected to a custodial interrogation." (quoting *United States v. Harrell*, 894 F.2d 120, 124 n.1 (5th Cir. 1990)). And even assuming that the pertinent portion of Defendant's interrogation may have taken somewhat longer than twenty to thirty minutes, the "approximately one hour" of detention that Defendant claims is still substantially less than the questioning in another case where, under similar circumstances, this Court found no custodial interrogation. *See United States v. McNair*, SA-10-CR-130, 2010 WL 2038297, at *2 (W.D. Tex. May 20, 2010) (finding no custodial interrogation where Defendant was questioned in upstairs bedroom of house, while search proceeded downstairs, for "approximately one hour and forty minutes" during which "Defendant admitted to having an interest in child pornography, and acknowledged that he had downloaded images and videos"), aff'd, 444 Fed. App'x 769 (5th Cir. 2011) ("the fact that McNair's interrogation lasted for almost two hours does not mean that the interrogation was per se custodial.").

Defendant argues that the location of the questioning weighs towards a finding of custodial interrogation, since he was "interrogated in a small bedroom away from any non-law enforcement personnel." Docket no. 64 at 7. Likewise, Defendant argues that the agents' claims that Defendant was free to terminate the interview and leave was undermined by their actions, such as summoning an additional officer into the room and instructing Defendant to remain seated after he became agitated and terminated the interrogation, "escort[ing] [Defendant] to the carport . . . to secure the dogs," and removing him from the carport after, they allege, he failed to comply with their instructions. But the fact that the interrogation occurred in Defendant's home, rather than at a police station or other similar location is a fact that "taken alone, lessens the likelihood of coercion." *Cavazos*, 668 F.3d at 194. In this case, like *Cavazos*, there are some factors that weigh against "the presumption that an in-home interrogation is non-coercive": at least six officers entered Defendant's home early in the morning without his consent; Defendant observed them enter with their weapons drawn, although their weapons did not remain drawn during the interrogation; Defendant asserts that, on two occasions during their interaction, he asked to inspect the search warrant and was refused; and, like Cavazos, Defendant's movements through the home were monitored by agents. However, the Court finds that other circumstances surrounding the interrogation were such that a reasonable person in Defendant's position at the time of the responsive portion of his interrogation in the bedroom would not have viewed the home as a "police-dominated atmosphere": He was not handcuffed; was explicitly told that he was not under arrest, was free to leave, and was not required to answer questions or speak with the agents; it was he, rather than agents, who initiated the interview; and the summoning of an additional officer, directive to remain seated, monitoring of his movements throughout the house, and removal of him from the carport did not occur until after he had terminated the interview and were not evident to him at the time he made the statements he seeks to have suppressed.

For these reasons, the Court finds that the statements that Defendant was not in custody for *Miranda* purposes at the time he made the statements he now seeks to have suppressed. The Court therefore concludes that Defendant's Motion to Suppress should be denied.[2]

Conclusion and Order

It is therefore ORDERED that Defendant's Motion to Suppress (docket no. 64) is DENIED.

SIGNED this 19 day of March, 2019.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

[2] For the same reasons, the Court finds that Defendant would not be entitled to relief under 18 U.S.C. § 3501(b), which was, in any event, codified in an "attempt to overrule *Miranda*" that the Supreme Court has "rejected[,]" *Corley v. United States*, 556 U.S. 303, 309 & n.1 (2009); *see also Dickerson v. United States*, 530 U.S. 428, 432 (2000) (explaining that, although Congress in Section 3501 set forth a rule regarding the admissibility of statements made during custodial interrogation at odds with *Miranda*, *Miranda* was "a constitutional decision of this Court" not subject to overruling by Congress). For that reason, "*Miranda* and its progeny"—not Section 3501—"govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson*, 530 U.S. at 432.